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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM K. RODERICK, Defendant and Appellant.	A135073 (Alameda County Super. Ct. No. CH-51167)

In this case involving indecent exposure defendant asserts error in the trial court's mid-deliberation instructions to the jury on grounds of claimed inaccuracy and coercive effect, as well as its general handling of jury notes indicating an impasse in deliberations. Defendant also claims the court erred in failing to instruct on the lesser included offense of attempted indecent exposure. We find no error and affirm.

FACTS

On March 18, 2011, about 3:00 p.m., Cheryl Lomax went out the back door of her second-floor apartment in Hayward to have a smoke. While she was standing on her apartment landing she noticed a man on the balcony of an apartment opposite hers, some 40 feet away. He was naked and was masturbating with his right hand and waving to her with his left. Although there were two trees near the balcony, there were no leaves or branches obstructing her view.[1] Lomax and defendant made eye contact.

[1] Defendant argues in his opening brief that "[t]ree branches obscure a clear view of the deck," citing the photograph introduced as defense exhibit F. That photograph was taken at a time when the trees were covered with leaves. But two witnesses repeatedly

After a moment of shock Lomax hurried to the front door of her apartment, where she knocked and hollered for her son to open the door. She told her son what she had seen. Her son then accompanied her back out to the landing. He shouted at the man (who was still masturbating and waving), "What the fuck are you doing, man?" When the man did not respond, Lomax yelled, "I am calling the cops." The man then went back inside his apartment.

Lomax dialed 911 and reported the incident, including a description of the man. The Hayward police came to her apartment and she pointed out the apartment where the man had been standing. The police went to the front of that apartment building and contacted defendant William Roderick because he matched the description given by Lomax. He was brought by police to be viewed by Lomax, and she confirmed he was the same man she had seen masturbating on his back balcony.

At trial, Lomax again identified defendant as the man she saw masturbating. She admitted, however, that she had not "entirely" seen his penis, but had seen his hand in the area of his penis. She was certain he was masturbating, and she was "shocked" and upset by the incident.

Appellant did not testify.

PROCEDURAL HISTORY, JURY INSTRUCTIONS, CLOSING ARGUMENT, AND JURY DELIBERATIONS

On November 1, 2011, defendant was charged with felony indecent exposure. (Pen. Code, § 314.)[2] The information also alleged two prior misdemeanor convictions for indecent exposure. He entered a not guilty plea on November 3, 2011.

The prior conviction allegations were bifurcated for trial. The current charge went to trial on January 4, 2012, and was given to the jury on January 5.

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testified the trees were bare at the time of the offense. People's exhibits 2 and 3 more accurately reflect Lomax's view of defendant's balcony.

[2] Undesignated statutory references are to the Penal Code.

At the conclusion of the trial, the court instructed the jury on the elements of indecent exposure, as follows:

"The defendant is charged with indecent exposure, violation of Penal Code section 314. For you to find the person guilty of that charge, the evidence must prove not only that the person intentionally committed the prohibited act, but also that the act was done with a specific intent. The specific intent is described in element two of the next slide.

"To find a person guilty of the charged crime, the evidence must prove that: (1) the defendant willfully exposed his genitals in the presence of another person or persons who might be offended or annoyed by the person's actions; and (2) when the defendant exposed himself, he acted lewdly by intending to direct public attention to his genitals for the purpose of sexually arousing or gratifying another person or sexually offending another person."[3] (See CALCRIM No. 1160.)

Thus, nothing was said by the judge in instructing the jury about the public or private nature of the place where the alleged exposure occurred. That was left for defense counsel, who argued as follows: "Clearly standing in a public or semi-public place masturbating is lewd conduct. Okay. If that's what we were talking about, the verdict would be guilty. But that's not what we're talking about." Defense counsel pointed out the relatively isolated nature of the location where appellant was observed masturbating, arguing that he did not expect others to be outside because it was raining. "This is a man masturbating on his personal balcony at the back of his home on a rainy day. It is just dumb luck that Ms. Lomax decided to have a smoke break."

The prosecutor argued in rebuttal that it was not a secluded spot because it was open to the neighbors' view. Moreover, defendant did not retreat into the house once he realized Lomax had seen him; he continued masturbating and waving.

Defense counsel also emphasized that Lomax had not seen defendant's genitals. She argued that this tended to show defendant had no intent to expose himself. "Ms.

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[3] The written instruction correctly indicated that the exposure must be "for the purpose of sexually arousing or gratifying *himself or* another person, or sexually offending another person." (Emphasis added.)

Lomax never saw his penis. So if you are intending to show your junk to someone, you would think you would do a good job, you would think you would make sure that the person saw it. If that's your intent, wouldn't you make sure they saw your penis? That didn't happen."

The prosecutor responded in rebuttal, "[W]hy is it she never saw his penis? That's kind of a loaded question. I am not going to try to answer that question myself, 'cause I don't want to be crude or crass. Again, he's exposed himself, he's attracted attention. Does she need to say, yeah, I saw this much of his penis, this much of his penis? She says in the 911 tape, 'He's jacking off.' And she's honest, 'I couldn't really see his penis, but he is exposed.' " He summarized, "Well, she didn't see his penis, but that's not where we're going to draw the line at because he has exposed himself."

The jury deliberated for less than an hour, sent out a note (No. 1), and retired for the evening. The note read: "(1) Can we confirm what C. Lomax said about what anatomy she saw? [¶] (2) What if anything was blocking C. Lomax's view of the defendant? [¶] (3) Can we hear the recording? [¶] (4) Can we get the text of the charge?" The judge did not respond to those questions before the evening recess.

On the next court date (January 9), an alternate replaced one of the jurors and deliberations commenced anew at 10:20 a.m. About half an hour later the jury sent out another note (No. 2) asking (1) to hear a tape of the 911 call; (2) for the reading of Lomax's testimony; and (3) whether a balcony is a public or private place, or was that for the jury to decide.[4] The court obliged the jury's first request and asked them to specify which parts of Lomax's testimony needed to be read back. The jury continued deliberating while counsel and the court discussed the third question.

Defense counsel asked that the court respond to the third question by telling the jury that "the People are not required to prove the act was done in a public place; however, such evidence may be considered in determining if Mr. Roderick had the

[4] The third question was phrased: "Can we clarify if the balcony is public or private or is it up to us to decide that?"

required intent." The prosecutor suggested defense counsel "essentially wants the court to re-emphasize something she was already given an opportunity to argue." The court instructed the jury: "Whether the balcony is public or private is not an element of the crime that the People must prove beyond a reasonable doubt. . . . It's not a part—an element of the crime that you have to decide."[5] The jury was also given a read-back of a portion of Lomax's testimony, as specified in a third note. The jury resumed deliberations and the court took its noon recess.

After deliberating approximately 40 more minutes, the jury sent another note (No. 4) saying, "We are deadlocked. One juror is holding out that since the penis was not seen then there is no cause for offense." The jury then took a lunch break at 12:22 p.m. and resumed deliberations at 1:20 p.m. At 2:15, the court brought the jury into the courtroom and explained that, given the short length of time it had deliberated and the quantity of read-back requested, the court was not yet prepared to declare a mistrial. It told the jury: "Maybe your deliberations have gone for an hour to two hours. And at this point the court's not prepared to say that that would be sufficient time for deliberations, to consider the evidence and discuss what you're presented with. So I am going to ask you to go back and continue deliberating and see where we end up at a later point in time. I am not suggesting that anybody is going to change their vote simply because of the press of time, but to discuss the issues and consider the act and consider the law is what I am encouraging you to do and just to continue to discharge your obligations as jurors, to be fair and impartial, and not to be advocates for one side or the other, but to consider the evidence in light of the law."

At 3:17 p.m. the jury sent a fifth note saying, "We have reviewed all the evidence [and] all the laws provided [and] believe that regardless of the time afforded us our current situation will not change. We have not reached a unanimous verdict."

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[5] Section 314 does contain the "public place" language and the charging instrument also contained that language. Whether that was what led to the jury's confusion or whether it was defense counsel's argument on public place versus private place exposure is impossible to tell.

The prosecutor voiced a concern that the jury was unable to reach a verdict because, as suggested by the fourth note, one juror was "not deliberating based on the law," but on his or her personal view that if the victim did not see the perpetrator's penis, "then [the victim] shouldn't have any reason to be offended." The prosecutor asked the court to address that issue "at some point."

The court then referred the attorneys to *People v. Carbajal* (2003) 114 Cal.App.4th 978, 986 (*Carbajal*), to be discussed at some length hereafter, which held that "testimony that witnesses observed the bare skin of the defendant's [fist] as it was wrapped around what appeared to be the defendant's penis and his hand was moving up and down and if it was open to view" that would be sufficient to support a conviction for indecent exposure.

The court proposed to call the jury back into the courtroom and to inquire into the jury's understanding of the charge. The prosecutor suggested giving a pinpoint instruction that "the person didn't need to see the defendant's penis."

Defense counsel had no objection to the prosecutor's proposal as long as she was given an opportunity to argue further to the jury. She agreed the proposed additional instruction was a correct statement of the law. She, in fact, had known "this was the state of the law from the beginning of the case." The prosecutor objected to further argument because, even in the absence of the instruction, both attorneys had already argued the significance of this evidence to the jury.

The court called the jury back in and asked if they were having difficulty reaching a verdict for the same reason reflected in note No. 4. The foreman answered, "Yes, sir." The court then instructed in language taken almost verbatim from *Carbajal, supra,* 114 Cal.App.4th 978:[6] "[S]ection 314 requires evidence that the defendant actually exposed his or her genitals in the presence of another person, but there is no requirement that such

[6] "[A] conviction for indecent exposure under . . . section 314, subdivision 1, requires evidence that a defendant actually exposed his or her genitals in the presence of another person, but there is no concomitant requirement that such person actually must have seen the defendant's genitals." (*Carbajal, supra,* 114 Cal.App.4th at p. 986.)

person actually must have seen the defendant's genitals." The court emphasized that the jury need only resume deliberations if they thought it would be productive: "I am going to ask you to deliberate further if you think that would be helpful." And after reading the pinpoint instruction, the court said again: "So if you think that declaration of the law is something that would be helpful in your deliberations, tell me and you can deliberate further. Now, if you think it's not going to assist you in any way, then you need not deliberate further." The jury foreman said, "I think it would be helpful, sir." After reading the pinpoint instruction one more time, the court said, "So I'd ask you to continue deliberating if you think that would be helpful," and the foreman said the additional instruction "would probably make a big difference." The jury returned for further deliberations.

Defense counsel put an objection on the record on the basis that the instruction, though "a true statement of the law," was "coercive to getting a conviction in this case." She argued that the pinpoint instruction should have been given with the other closing instructions so she could have "attack[ed] that portion of the law." While she was speaking, and within three minutes after resuming deliberations, the jury buzzed that it had reached a verdict. The guilty verdict was then read in open court.

The next day, January 10, 2012, the prior convictions were tried to the same jury. The jury found the two prior conviction allegations to be true, making the current offense a felony. (§ 314.)

Defendant was granted probation on February 24, 2012. On March 6, 2012, he filed a timely notice of appeal.

DISCUSSION

Defendant first raises several issues relating to the trial court's supplemental instruction during deliberations: (1) the instructions were misleading, argumentative, and incomplete; (2) the instructions coerced a verdict in violation of due process, the right to a jury trial, and section 1140; (3) the court erred in refusing defense counsel's request for the additional instruction that Lomax's failure to see defendant's penis was a factor to consider in evaluating defendant's intent; and (4) the court abused its discretion by

refusing to allow further argument following the supplemental instruction. As a separate claim of error, he contends the court erred by failing to give an instruction on attempted indecent exposure.

I. General Principles of Law of Indecent Exposure

Section 314 provides in relevant part: "Every person who willfully and lewdly . . . : [¶] 1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . [¶] . . . is guilty of a misdemeanor. [¶] . . . [¶] Upon the second and each subsequent conviction under subdivision 1 of this section, . . . every person so convicted is guilty of a felony . . . ."

The offense of indecent exposure requires proof of two elements: " '(1) the defendant must willfully and lewdly expose the private parts of his [or her] person; and (2) such exposure must be committed in a public place or in a place where there are present other persons to be offended or annoyed thereby.' " (*Carbajal*, *supra*, 114 Cal.App.4th at p. 982.) Though the elements are broken out somewhat differently in the CALCRIM instruction given by the trial court,[7] the substance of the instruction is consistent with the statutory definition.

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[7] The relevant text of CALCRIM No. 1160 reads as follows:

"The defendant is charged [in Count _____] with indecent exposure [in violation of Penal Code section 314].

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant willfully exposed (his/her) genitals in the presence of another person or persons who might be offended or annoyed by the defendant's actions;

"[AND]

"2. When the defendant exposed (himself/herself), (he/she) acted lewdly by intending to direct public attention to (his/her) genitals for the purpose of sexually arousing or gratifying (himself/herself) or another person, or sexually offending another person(;/.) [¶] . . . [¶]

"Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

II. Mid-deliberation Instructions

Section 1138 requires a judge to answer questions posed by the jury during their deliberations in open court: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

The Supreme Court has elaborated on the judge's duty: "The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. [Citation.] The trial court [may be] understandably reluctant to strike out on its own. But a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

The trial court's decision to instruct or not to instruct is reviewed under the abuse of discretion standard. (*People v. Waidla* (2000) 22 Cal.4th 690, 745-746.) A claim that the substantive information conveyed was inaccurate is a question of law, which we review de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1424.)

"[It is not required that another person actually see the exposed genitals.]"

A. The mid-deliberation instructions were correct statements of the law

1. *Exposure does not have to occur in a public place.*

" 'At common law, the "indecent exposure" of the private parts of a person to public view was treated as a nuisance and punishable as a misdemeanor. It was not required that the exposure be observed; it was necessary merely that the exposure occur in a public place.' " (*Carbajal*, *supra*, 114 Cal.App.4th at p. 983, quoting 3 Wharton's Criminal Law (15th ed.1995) § 308, pp. 196-200.) The statute continues to use the "public place" language, but expands liability to exposure that occurs "in any public place, *or in any place where there are present other persons to be offended or annoyed* thereby." (§ 314; italics added.)

As noted above, no mention of "public place" is contained in the current CALCRIM jury instruction or in the instruction initially given by the court in this case.[8] (See fn. 7, *ante*.) Exposure in a public place is evidently seen as a subset of exposure where "there are present other persons to be offended or annoyed thereby." (§ 314.) The court's instruction was therefore correct, and defendant's trial counsel said it was "[o]bviously" so.

Her request for an additional tag-on that the public or private nature of the setting "may be considered in determining if Mr. Roderick had the required intent" was in essence a request for a pinpoint instruction emphasizing certain evidence for the jury to "consider." A defendant is entitled, upon request, to a nonargumentative instruction that pinpoints his or her theory of the case. (*People v. Wright* (1988) 45 Cal.3d 1126, 1135-1136.) An instruction that directs the jury to " 'consider' " certain evidence is, however, properly "rejected as argumentative." (*Id*. at p. 1135.)

The instruction given was not, as defendant contends, argumentative or incomplete. Rather, modifying it to suit defense counsel would have made it argumentative and duplicative. The jury had already been instructed that circumstantial

[8] CALJIC No. 10.38 continues to include the "public place" language as an alternative theory of liability. (California Jury Instructions, Criminal (Fall 2012) No. 10.38, p. 95 [felony] and No. 16.220, p. 817 [misdemeanor].)

evidence could be relied on in determining defendant's intent, and defense counsel had already argued the significance of the evidence to the jury.

2. *There is no requirement that anyone must have seen the exposed penis*.

As noted above, a bracketed section of CALCRIM No. 1160 reads: "It is not required that another person actually see the exposed genitals." (CALCRIM No. 1160, p. 1019.) Although this bracketed material was not given in the initial jury instructions, the supplemental instruction given by the court in response to the jury's declaration of a deadlock was substantively the same and was based on *Carbajal*. (See CALCRIM No. 1160, p. 1020, Bench Note citing *Carbajal*, *supra*, 114 Cal.App.4th at p. 986.)

In *Carbajal*, as here, there was no evidence that anyone saw the defendant's naked genitals. But a restaurant cashier did observe the defendant on two different occasions apparently masturbating at a table. The first time, "defendant placed his fist inside his shorts and moved his hand up and down for about 5 to 10 minutes." (*Carbajal*, *supra*, 114 Cal.App.4th at p. 981.) A few weeks later, the defendant engaged in similar conduct, except that he also "ejaculated onto the floor beneath the table. The area had been clean before [the] defendant sat there. Prior to leaving the restaurant, defendant wiped his hand off with a napkin and threw a newspaper on top of the puddle of semen." (*Ibid*.) The cashier did not see the defendant's penis on either occasion. (*Ibid*.) She was not sure whether "defendant had his fist on his penis during the first incident, but the second time she was sure that he did. On that occasion, defendant wore a t-shirt that fell below his crotch and a pair of loose-fitting, knee-length shorts. Although [the cashier's] view of [the] defendant's genitals was partially obscured by chairs and by his clothing, she could tell he had taken his penis out of his shorts while holding it in his fist because she could see the skin of his fist '[w]hen he made strong movements . . . .' She recognized the white substance deposited on the floor underneath the table as semen." (*Ibid*.) The trial court granted the defendant's motion for acquittal with regard to the first incident for lack of sufficient evidence and the jury found him guilty of indecent exposure relating to the second incident. (*Ibid*.)

After a comprehensive review of the common law and cases from other jurisdictions, *Carbajal* concluded that a conviction for indecent exposure under section 314 "requires evidence that a defendant actually exposed his or her genitals in the presence of another person, but there is no concomitant requirement that such person actually must have seen the defendant's genitals." (*Carbajal*, *supra*, 114 Cal.App.4th at p. 986.) In light of this authority, the court's mid-deliberation instruction was unquestionably a correct statement of law. It was not, as defendant argues, misleading, argumentative, or incomplete.

B. <u>The instruction did not coerce a verdict</u>

Defendant relies on section 1140,[9] as well as the Sixth Amendment right to a jury verdict, and the Fourteenth Amendment right to due process to argue that the jury's verdict was coerced by the judge's instructions. Defendant's quarrel seems to be with all of the instructions given after the jury had first announced it was "deadlocked."[10] It is true the jury did not specifically request further instruction. Defendant seems to be especially concerned with the instruction that the victim need not have seen defendant's penis to be convicted under section 314. As noted above, the jury reached a verdict just minutes after this instruction was given.

But not every refusal to declare a mistrial at first sign of a deadlock amounts to jury coercion. (See, e.g., *People v. Pride*, *supra*, 3 Cal.4th at pp. 265-266 [trial court may instruct jurors who report a deadlock to continue deliberating if there is a reasonable probability they may be able to reach a verdict].) "The determination whether there is

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[9] That section reads: "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

[10] Even if the jury's note referring to one juror "holding out" could have led the trial court to conclude the jury was divided 11 to 1 in favor of conviction, such a numerical division does not preclude sending the jury back for further deliberation and is not per se coercive. (*People v. Pride* (1992) 3 Cal.4th 195, 265; *People v. Neufer* (1994) 30 Cal.App.4th 244, 253-254.)

reasonable probability of agreement rests in the discretion of the trial court. [Citations.] The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' " (*People v. Breaux* (1991) 1 Cal.4th 281, 319; see also, *People v. Rodriguez* (1986) 42 Cal.3d 730, 775; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1121.) The court may order the jury to deliberate further " 'as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.' " (*People v. Miller* (1990) 50 Cal.3d 954, 994.)

When a jury has reported an impasse, California Rules of Court, rule 2.1036(a)[11] expressly allows a trial judge to "advise the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other." Consistent with that rule, the initial instruction to continue deliberating after the jury first announced it was deadlocked was a simple direction to spend more time discussing "the evidence in light of the law." There was no abuse of discretion in ordering further deliberation. The jury had not deliberated long. (Cf. *People v. Bajo* (1963) 220 Cal.App.2d 741, 742-743 [court did not err in sending jury for further deliberation after it announced it was deadlocked after deliberating only three hours].) The court's instruction was neutral, confined the jury's consideration to the evidence and the law, and did not suggest that the jury must return a verdict. The instruction was not of a character that would expressly or impliedly coerce a verdict. (See *People v. Valdez* (2012) 55 Cal.4th 82, 163; *People v. Gainer* (1977) 19 Cal.3d 835, 842-843, 852; cf. *People v. Sheldon* (1989) 48 Cal.3d 935, 959-960 [giving examples of coercive admonitions].)

The second potentially "coercive" instruction was the one that actually led to a verdict within minutes. That instruction, as quoted above, merely told the jury that no

[11] Further references to rules are to the California Rules of Court.

one had to see defendant's penis for him to be found guilty of indecent exposure. As explained above, that was a correct statement of law.

Note No. 4 had contained enough unsolicited information about the jury's point of disagreement that the court could infer there was confusion on a legal point, i.e., whether it was necessary for Lomax to have seen defendant's penis. Though the jury's notes No. 4 and No. 5 were not framed as questions about the law, it was fully within the court's discretion under section 1140 to give further legal instruction that might alleviate the misunderstanding. (See *People v. Thomas* (1991) 231 Cal.App.3d 299, 302-303 [court did not err in requesting jury to continue deliberations where one juror indicated further instruction might help to resolve the impasse].)

The court did not err simply because it gave that instruction during deliberations rather than with the other instructions. Section 1093.5 expressly allows a trial judge to instruct on an issue raised by closing arguments and not covered by instructions already given: "if, during the argument, issues are raised which have not been covered by instructions given or refused, the court may, on request of counsel, give additional instructions on the subject matter thereof." Indeed, a "trial ' "judge must always be alert to the possibility that counsel in the course of argument may have befuddled the jury as to the law. If this occurs, then either at the time the confusion arises or as part of the final instructive process the judge should rearticulate the correct rule of law." ' [Citations.] The court has 'a duty to reinstruct if it becomes apparent that the jury may be confused on the law.' " (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 128.)

Indeed, pursuant to rule 2.1036(a), in the case of an impasse the judge should "ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching a verdict." The judge may also: "(1) Give additional instructions; [¶] (2) Clarify previous instructions; [¶] (3) Permit attorneys to make additional closing arguments; or [¶] (4) Employ any combination of these measures." (Rule 2.1036(b).) This is just how the court proceeded.

By inquiring of the foreman before launching into further instruction the court moved cautiously in giving the jury only so much instruction as would assist it in

discharging its duty. The instruction given was clearly justified on the evidence and the foreman's statement about the nature of the jury's disagreement. The court cleared up the confusion by giving the jury an instruction patterned after *Carbajal*.

The court may have *facilitated* the jury in reaching a verdict, but it did not "coerce" a verdict. In fact, the court sought the opinion of the jury foreman about the utility of the instruction before ordering further deliberations. The jury foreman said the additional instruction "would probably make a big difference." That the court clarified this point of law when the jury made its difficulty known was not coercive, but corrective.

C. There was no error in failing to instruct that Lomax's failure to see defendant's penis was a factor to consider in determining defendant's intent

Defendant next argues that the court should have embellished its instruction with what amounts to a further pinpoint instruction that Lomax's failure to see defendant's penis was a factor that could be considered in determining whether defendant had the requisite intent. We reject his theory.

That no one needed to have seen defendant's exposed penis was not an obscure legal point, but an instruction on that issue was not required sua sponte. A bracketed part of the standard instruction dealt specifically with it and arguably should have been given as part of the original instruction. This was not, however, judicial error. The Bench Notes indicate that this bracketed material should be read to the jury "on request," and no one requested it. (CALCRIM 1160, Bench Notes, p. 1020.) This was a windfall to the defense. The court's later clarification did not amount to error simply because the court refused the defense request to instruct on how the evidence should be used. Defendant cannot now complain that he was somehow prejudiced when the instruction was later amplified.

To begin with, this argument has been forfeited. Defense counsel did request supplementation of the instruction about the public or private nature of the setting with

language that such a consideration could be a factor in determining defendant's intent.[12] No such request accompanied her objection to the instruction concerning whether defendant's penis was actually seen. Instead, defense counsel asked for further argument on that point. Therefore, any claim that an additional clarifying or amplifying instruction was required has been forfeited on appeal. (*People v. Marks* (2003) 31 Cal.4th 197, 237 [defendant's contention that a court's response to a jury inquiry regarding its instructions was incorrect and stating, "if defendant favored further clarification, he needed to request it. His failure to do so waives this claim"].)

But even if we were to overlook the forfeiture, there is no merit to defendant's contention. The instruction did not tell the jury it could *not* consider Lomax's inability to see defendant's penis in determining whether defendant (1) *willfully* exposed himself or (2) exposed himself with *lewd intent*. The instruction now proposed would not have clarified a legal point, but rather would have highlighted particular evidence for the jury's consideration and instructed the jury on how the evidence should be used in relation to the law. Such an instruction would properly have been denied as argumentative in that it would have tended to unfairly emphasize a particular piece of evidence tending to favor defendant. (*People v. Wright*, *supra*, 45 Cal.3d at pp. 1135-1136.) The court did not err in refusing to so tip the scales in favor of the defense.

D. <u>Denial of the defense request for additional argument was not error</u>

Defense counsel requested another opportunity to argue to the jury after the final instruction was given to the jury. Rule 2.1036(b)(3) expressly allows for additional argument in the event of an impasse. Such a decision, however, is subject to review only for abuse of discretion. (*People v. Young* (2007) 156 Cal.App.4th 1165, 1170-1172.) No such abuse here.

[12] As for the request for additional instruction on the public/private nature of the balcony, defense counsel had already argued to the jury about the public or private nature of the balcony. Nothing in the court's instruction undercut or invalidated the points she had made in closing argument.

There was no need for additional argument, as counsel for both sides had already addressed the fact that Lomax had not seen defendant's penis. It had already been explained how Lomax's inability to see defendant's penis could be factored into their decision. This factor had already been addressed by both counsel.

Defense counsel acknowledged on the record that the judge's instruction was an accurate statement of the law. And she knew full well when she made her closing argument that the law did not require that Lomax had seen defendant's penis. She told the court she had been aware of that rule "from the beginning of the case." Thus, she was not surprised by the impact of the additional instruction. She could have, should have, and we believe did, tailor her argument so as to avoid running afoul of this legal rule while also making the most of the missing instruction.

That the instruction was not given until it became clear that the jury was confused on the point does not give counsel a right to further argue on the clarifying instruction. Defendant offers no authority to support his position. The instruction did not concern a new theory of the crime. (Cf. *People v. Ardoin, supra,* 196 Cal.App.4th at pp. 127-129.) There was no error.

III. Failure to Instruct Sua Sponte on Attempted Indecent Exposure

Defendant does not question the correctness of the indecent exposure instruction given the jury. But he does contend that the court erred in failing to instruct on the lesser included offense of attempted indecent exposure. He claims the omission deprived him of due process and of a jury determination of every material fact. (U.S. Const., 6th & 14th Amends.)

A trial court is required to instruct the jury sua sponte "on general principles of law that are 'closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case.' [Citation.]" (*People v. Moye* (2009) 47 Cal.4th 537, 554.) This includes the duty to instruct sua sponte on any lesser included offenses supported by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162 (*Breverman*); *People v. Barton* (1995) 12 Cal.4th 186, 194-195.) The converse of this rule is that the court is not required to instruct on theories the jury could not

reasonably find to be true. (*Breverman*, at p. 154.) " ' "Substantial evidence" in this context is " 'evidence from which a jury composed of reasonable [persons] could . . . conclude[]' " that the lesser offense, but not the greater, was committed.' [Citation.]" (*People v. Haley* (2004) 34 Cal.4th 283, 312; see also *Breverman*, at p. 162.) Substantial evidence must be of " ' "ponderable legal significance," ' " " ' "reasonable in nature, credible, and of solid value." ' " (*People v. Campbell* (1994) 25 Cal.App.4th 402, 408.) There is no duty to instruct on a lesser included offense supported only by " 'minimal and insubstantial' " evidence. (*Barton*, at p. 201.)

An attempt to commit a crime consists of a specific intent to commit the crime and a direct but ineffectual act done toward its commission. (§ 21a; *People v. Bailey* (2012) 54 Cal.4th 740, 749.) It has been said that an attempt to commit an offense is always a lesser included offense of the completed crime. (See *People v. Vanderbilt* (1926) 199 Cal. 461, 463-464; *In re Sylvester C.* (2006) 137 Cal.App.4th 601, 609 ["attempt is a lesser included offense of any completed crime"]; *People v. Meyer* (1985) 169 Cal.App.3d 496, 506 ["every substantive criminal offense necessarily includes the attempt to commit it"]; but see *Bailey*, at pp. 749, 753 [not true of attempt to commit general intent crime].) We agree that in appropriate circumstances an instruction on attempted indecent exposure may be required as a lesser included offense of indecent exposure.[13] (CALCRIM No. 1160, Lesser Included Offenses, pp. 1021-1022.) But "a trial judge need not instruct the jury as to all lesser included offenses, just those that find substantial support in the evidence." (*People v. Haley*, *supra*, 34 Cal.4th at p. 312.)

In this case there was no substantial evidence that the crime was less than that charged. There was no evidence of an ineffectual act, but rather the successful

[13] CALCRIM cites *People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1769, and *People v. Finley* (1994) 26 Cal.App.4th 454, 455. In both of those cases the charging instrument alleged *only* attempted indecent exposure and there was no discussion in the opinion of the requirement of sua sponte instruction on attempt as a lesser included offense.

completion of an exposure of defendant's private parts within the view of Lomax and her son.

The only evidence pointed to by defendant is the fact that the exposure occurred while defendant was on his own balcony, where he supposedly was masturbating in peace until Lomax showed up across the way. Defendant's briefing suggests he may have believed he would not be seen on his back deck and did not expect people to be out there because it was raining. But if defendant had been unaware of Lomax's presence, the specific intent to expose himself would have been lacking altogether. A conviction for attempted exposure would have been improper.

Moreover, there was no evidentiary support for the theory that defendant was ignorant of Lomax's presence. He and Lomax made eye contact, so there is no reasonable support for the idea that he did not see her. Moreover, he did not turn and run back into his house when he saw Lomax, but rather waved at her, thereby calling attention to his nudity and masturbatory activity. This factor suggests both that his exposure was willful (i.e., that he wanted Lomax to see him) and that it was lewd (i.e., that he had a sexual intent of arousing himself or offending Lomax). There was no basis for the jury to find this was an ineffectual attempt to expose himself. The actual exposure was indisputable. Defendant had proceeded well beyond an attempt.

The real issue at trial was whether defendant *intended* to expose himself. If he did then he was guilty of the crime of which he was convicted. If he did not, then he was guilty of neither indecent exposure nor attempted indecent exposure.

Nor would the failure to instruct on attempted indecent exposure raise a claim of federal constitutional dimension. Failure to instruct on a lesser included offense of a capital crime has been held to constitute federal constitutional error. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.) But in a noncapital case the failure to so instruct does not present a federal question. (*Breverman*, *supra*, 19 Cal.4th at pp. 177-178.) Defendant attempts to convince us, by citation to outlying federal circuit decisions, that failure to instruct on a lesser included offense is federal constitutional error. Even if we were inclined to so conclude, we would be bound by California Supreme Court precedent

(*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), which holds that failure to instruct on a lesser included offense is at most state law error. (*Breverman*, at p. 165.)

And even if we assumed there were some error in the failure to instruct on attempt, we would not find it a ground for reversal. The state standard of prejudice applies. (*Breverman*, *supra*, 19 Cal.4th at p. 165; *People v. Watson* (1956) 46 Cal.2d 818, 836.) " 'Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' " (*People v. Thomas* (2012) 53 Cal.4th 771, 814.) The evidence of both exposure and intent was strong, and there was no evidence that defendant abandoned his exhibition until Lomax threatened to call the police. At that point the indecent exposure was complete and no reasonable juror could have concluded it was an incomplete attempt. There is no reasonable likelihood the jury would have convicted defendant of attempted indecent exposure even if the instruction had been given.

DISPOSITION

The judgment is affirmed.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Lambden, J.